

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 13, 2009 Session

STATE OF TENNESSEE v. ROBERT R. LADD

**Interlocutory Appeal from the Criminal Court for Macon County
No. 06-43 Jane Wheatcraft, Judge**

No. M2008-02826-CCA-R9-CD - Filed September 17, 2009

The Defendant, Robert R. Ladd, filed a Rule 9 interlocutory appeal seeking our review of the trial court's ruling that the Assistant District Attorney General ("ADA") did not abuse his discretion when he denied the Defendant's application for pretrial diversion. After a thorough review of the record and relevant authorities, we conclude that the trial court properly affirmed the ADA's denial of pretrial diversion. Accordingly, we affirm the judgment of the trial court.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Patrick T. McNally, Nashville, Tennessee, for the Appellant, Robert R. Ladd.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Melissa Roberge, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; Howard L. Chambers, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The underlying facts of the case, as stated in the Assistant District Attorney General's denial of the Defendant's application for pretrial diversion, are as follows:

[The Defendant] was indicted by the February 2006 Grand Jury of Macon County, Tennessee with violating T.C.A. § 71-5-118(b)(2)(A). There are three counts to the indictment. In each count the Defendant is charged with writing

prescriptions for a female who was in TennCare in exchange for sexual favors. The Defendant is a medical doctor. The three counts cover a time period of April 25, 2004 thru September 8, 2004. The prescriptions were for morphine and Oxycontin.

The Defendant was indicted and arraigned on three counts of aiding and abetting in TennCare fraud. Subsequently, the Defendant filed an application for pretrial diversion.

The ADA denied the Defendant's application for pretrial diversion. The ADA based its denial on the following five reasons:

- (1) The Defendant, a licensed doctor being in a role of trust with his patients, knowingly committed a fraud for sexual favors.
- (2) The Defendant, a licensed doctor, knowingly committed a fraud against a state program designed to aid persons without insurance.
- (3) These crimes are dangerous because medication is being prescribed to persons who will likely abuse the medicine.
- (4) These crimes, considering the Defendant[']s past history with over-prescribing medication, show the need for deterrence with this individual.
- (5) Diversion would not meet the ends of justice and would be against public policy.

The Defendant then filed a writ of certiorari with the trial court, and the trial court affirmed the ADA's decision, finding that he did not abuse his discretion. The Defendant appeals the trial court's ruling to this Court through an interlocutory appeal pursuant to Tennessee Rules of Appellate Procedure, Rule 9.

II. Analysis

The Defendant argues that the ADA focused on irrelevant issues and showed an unwillingness to consider factors that weighed in favor of pretrial diversion. The State counters that there is substantial evidence in the record that supports the denial of Defendant's application for pretrial diversion.

The pretrial diversion statute allows the district attorney general to suspend the prosecution of an eligible defendant for a period of up to two years. *See* T.C.A. § 40-15-105(a)(1). A defendant is statutorily eligible for pretrial diversion if the defendant: (1) has not previously been granted pretrial diversion; (2) does not have a disqualifying prior conviction; (3) and is not seeking pretrial diversion for a class A felony, a class B felony, certain class C felonies, a sexual offense, driving under the influence, or vehicular assault. *Id.* at (a)(1)(B)(i).

Nonetheless, statutory eligibility for pretrial diversion does not entitle a defendant to diversion. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). Rather, the state has the sole discretion to determine whether to grant pretrial diversion to a defendant who meets the strict statutory requirements. T.C.A. § 40-15-105(b)(3); *State v. Pinkham*, 955 S.W.2d 956, 959 (Tenn. 1997). The state must focus on the defendant's amenability to correction and consider any factors which demonstrate the defendant's propensity to become a repeat offender. *State v. Yancey*, 69 S.W.3d 553, 557 (Tenn. 2002); *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). These factors include: (1) the circumstances of the offense; (2) the defendant's criminal record; (3) the defendant's social history; (4) where appropriate, the defendant's physical and mental condition; (5) the likelihood pretrial diversion will serve the ends of justice; and (6) the best interest of both the public and the defendant. *Hammersley*, 650 S.W.2d at 355. The state may also consider the need for general deterrence. *State v. McKim*, 215 S.W.3d 781, 787 (Tenn. 2007).

If pretrial diversion is denied, the denial must be in writing, listing and discussing the various factors considered and the weight attributed to each factor. *Curry*, 988 S.W.2d at 157. Failure to consider and articulate relevant factors will constitute an abuse of discretion. *State v. Bell*, 69 S.W.3d 171, 178 (Tenn. 2002). Additionally, a district attorney general must avoid relying upon irrelevant factors when denying diversion. *Id.*

A defendant may appeal to the trial court for a writ of certiorari, if an application for pretrial diversion is denied, to determine whether the prosecution abused its prosecutorial discretion. T.C.A. § 40-15-105(b)(3) (2006). In reviewing the prosecutor's decision, the trial court must view the decision of the prosecutor as "presumptively correct and it should only be set aside on the basis of patent or gross abuse of prosecutorial discretion." *State v. Watkins*, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980). The discretion to grant or deny pretrial diversion rests with the prosecution rather than the trial court. *Bell*, 69 S.W.3d at 179. The trial court must consider only the evidence considered by the prosecution and conduct a hearing only to resolve factual disputes concerning the application. *Curry*, 988 S.W.2d at 157-58. The trial court may not reweigh the evidence or substitute its view for that of the prosecutor. *Bell*, 69 S.W.3d at 179. Before the trial judge can find an abuse of discretion, the record must show an absence of any substantial evidence to support the refusal of the prosecution to enter into a memorandum of understanding. *Watkins*, 607 S.W.2d at 488.

If the trial court does not find an abuse of discretion and affirms the prosecutor's denial of the application for pretrial diversion, the defendant may then seek an interlocutory appeal. Tenn. R. App. P. 9. On appeal, this Court must determine whether the trial court's decision is supported by a preponderance of the evidence. *Curry*, 988 S.W.2d at 158.

In the case under submission, the trial court, when it reviewed the ADA's decision to deny the Defendant's application for pretrial diversion, made the following finding:

In the case at bar, the State discussed the social and criminal history of the Defendant, the circumstances of the offense, his amenability to rehabilitation, his mental and physical condition and the reasons for denial including the Defendant's

past problems with his CEA certification and licensure. The Court finds that the State considered all the relevant factors required of it and [t]he Court cannot find as a matter of law that it abused its discretion.

Likewise, we also find in our review of the record that the ADA listed and discussed the relevant factors in his written denial of the Defendant's application for pretrial diversion.

The Defendant argues that the ADA's reliance upon irrelevant issues to deny pretrial diversion constituted an abuse of discretion. The Defendant specifically challenges the ADA's characterization of the Defendant's conduct as "prostitution or rape" and the ADA's consideration of the purpose of TennCare and prevalence of TennCare fraud.

The Defendant in this case is charged with aiding TennCare enrollees in fraudulently obtaining prescription medication in exchange for sexual favors. In the ADA's response denying the application, he specifically addresses the circumstances of the offense. He finds that the circumstances of the offense support the denial of pretrial diversion, stating, in part, "The act of exchanging drugs for sex is either participating in prostitution or rape. Either of these is a crime against a person. Maybe the women were willing participants, but this Defendant was in a position of trust. He violated this position by his actions." The ADA is required to consider the circumstances of the offense in determining whether to grant pretrial diversion. *Hammersley*, 650 S.W.2d at 355. In considering the circumstances of this offense, the ADA used strong and direct terminology that may not have been technically correct, but effectively made his point. His reference to prostitution and rape were, in our view, intended to highlight the fact that this offense involved inappropriate sexual contact by a medical doctor with two of his patients rather than an issue involving monetary fraud. The Assistant District Attorney General did not abuse his discretion in examining the circumstances of the offense.

The second issue the Defendant identifies as an irrelevant factor considered by the ADA is the consideration of the TennCare Program and the prevalence of TennCare fraud in Tennessee as evidence of the need for deterrence of the Defendant's crime. The Defendant asserts that the prevalence of arrests and convictions for TennCare fraud is irrelevant. Our Supreme Court, in *State v. McKim*, however, specifically states that an assistant district attorney general may consider general deterrence in determining whether to grant or deny pretrial diversion. *McKim*, 215 S.W.3d at 787. The prevalence of this particular crime in this state does show an indication of whether or not there is a need for general deterrence and is a relevant factor for consideration. *Id.*; *State v. Hill*, No. M2008-01344-CCA-R10-C, 2009 WL 890869, at *4 (Tenn. Crim. App., at Nashville Mar. 30, 2009); *See Watkins*, 607 S.W.2d at 489. We conclude that both the circumstances of the offense and general deterrence are relevant factors to be considered, and the Defendant is not entitled to relief on these issues.

Next, the Defendant argues that the ADA showed an unwillingness to consider factors that weighed in favor of pretrial diversion. The ADA in his written denial acknowledges that the Defendant's criminal record, social history and present condition all weigh in favor of pretrial

diversion. The record establishes that the ADA considered factors that weighed in favor of pretrial diversion. The Assistant District Attorney General, however, also found that the Defendant's history and previous discipline for similar issues related to prescribing scheduled drugs did not weigh in favor of the Defendant.

The record indicates that in 1989, the Board of Osteopathic Examiners, issued an order finding the Defendant in violation of Tennessee Code Annotated section 63-9-111(a)(4). The Board found the Defendant guilty of "[a] pattern of continued ignorance, negligence or incompetence in the course of his medical practice as evidenced by his over[]prescribing of scheduled drugs and inadequate medical record[]keeping." This determination resulted in a six-month suspension of the Defendant's Drug Enforcement Administration license and a requirement that he attend a course in the prescribing and dispensing of controlled substances.

The ADA, in denying the Defendant's request, stated:

In looking at the past as a guide to the future, this Defendant has not shown a willingness to conform as the new charges are consistent with past problems. [The Defendant's] pattern of conduct suggests he would be a repeat offender. While the Defendant has a lack of a past criminal record, he does have a past record of prescribing and dispensing controlled substances improperly.

The Defendant's amenability to correction is the proper focus for a district attorney in granting or denying pretrial diversion. *See Curry*, 988 S.W.2d at 157; *Hammersley*, 650 S.W.2d at 355. In our view, the ADA properly considered the 1989 finding by the Board of Osteopathic Examiners as a relevant factor in his negative assessment of the Defendant's amenability to correction. Because the ADA properly exercised his discretion as to this factor, the Defendant is not entitled to relief on this issue.

Finally, the Defendant argues that the instant case is analogous to the *McKim* case. *See McKim*, 215 S.W.3d 781. In *McKim*, the prosecutor did not consider certain factors favoring diversion, but did consider factors irrelevant to diversion. The prosecutor stated that defendants charged with criminally negligent homicide should not be statutorily eligible for pretrial diversion and that it was legislative error for this category of crime to not be excluded from pretrial diversion consideration. Because of the consideration of irrelevant factors and the lack of consideration of factors favoring diversion, our Supreme Court held that the prosecutor abused his discretion. The Defendant in this case argues that the ADA is adopting a policy not to grant pretrial diversion to any doctor charged with TennCare fraud. Unlike the prosecutor in *McKim*, however, the prosecutor in this case considered all relevant factors and considered the specific circumstances of the Defendant's conduct and offense. In *McKim*, the prosecutor denied diversion based upon the commission of a specific crime, not because of the circumstances of the specific crime committed. Not all persons charged with TennCare fraud are physicians and not all persons charged with TennCare fraud exchange prescriptions for sex from patients in committing the fraud. Whereas, the ADA noted the statewide problem with TennCare fraud, he also relied on facts specific to the Defendant's conduct

in committing this crime. We conclude that the ADA adequately delineated his reasoning for the denial and did not abuse his discretion as a prosecutor. Thus, the Defendant is not entitled to relief.

III. Conclusion

On review, we conclude that the trial court's determination that the assistant district attorney did not abuse his discretion when he denied the Defendant pretrial diversion was supported by a preponderance of the evidence. For the reasons stated above, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE